IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	)	
	)	
vs.	)	Criminal Action
	)	No. 2009-cr-00593
EDWIN FRANCISCO VASQUEZ-ALVAREZ,	)	
	)	
Defendant	)	

O R D E R

NOW, this 29th day of February, 2012, upon consideration of the following documents:

(1) Motion to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody, which motion was filed by defendant pro se on April 11, 2011[1]; together with the following documents:

(a) Memorandum of Points and Authorities in Support of Writ of Habeas Corpus Pursuant to Title 28 U.S.C. § 2255;

(b) Declaration in Support of Request to Proceed In Forma Pauperis; and

(c) Declaration of Edwin Francisco Vasquez-Alvarez;

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[1] The docket entries reflect that the petition for writ of habeas corpus was filed April 11, 2011. However, defendant indicated next to his signature that he executed the petition on January 14, 2011. (See Motion to Vacate, page 8.)

The prison mailbox rule deems a motion to have been filed on the date the petitioner delivered his petition to prison officials to mail. Burns v. Morton, 134 F.3d 109, 113 (3d Cir. 1997). However, nothing in defendant's submissions indicates that he delivered his petition to prison officials to mail on or about January 14, 2011. Defendant has not accounted for the near three-month delay between when he signed the petition and when it was received.

Thus, defendant has not provided grounds for the inference that the prison mailbox rule should apply to deem January 14, 2011, or any date earlier than April 11, 2011, as the date of filing. However, it should be noted that defendant's petition is timely whether the date on which it was filed is construed as either January 14, 2011 or April 11, 2011.

(2) Government's Response to Petitioner's Motion Under 28 U.S.C. § 2255, which response was filed on July 13, 2011; and

(3) Petitioner's Response to Government's Reply Brief in Opposition to Defendant's Motion Pursuant to 28 U.S.C. § 2255, which response was filed on August 30, 2011;

and for the reasons articulated in the accompanying Opinion;

IT IS ORDERED that the Motion to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody is dismissed without a hearing.

IT IS FURTHER ORDERED that a certificate of appealability is denied.

IT IS FURTHER ORDERED that the Clerk of Court shall mark the above-captioned matter closed for statistical purposes.

BY THE COURT:

/s/ JAMES KNOLL GARDNER
James Knoll Gardner
United States District Judge

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EDWIN FRANCISCO VASQUEZ-ALVAREZ,	)	
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* * *

APPEARANCES:

FRANK R. COSTELLO, JR., ESQUIRE
Assistant United States Attorney
On behalf of the United States of America

EDWIN FRANCISCO VASQUEZ-ALVAREZ
Pro Se Defendant

* * *

O P I N I O N

JAMES KNOLL GARDNER,
United States District Judge

This matter is before the court on the Motion to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody filed by defendant Edwin Francisco Vasquez-Alvarez pro se on April 11, 2011.[2] On July 13, 2011, the Government's Response to Petitioner's Motion Under 28 U.S.C. § 2255 was filed. Petitioner's Response to Government's Reply Brief in Opposition

[2] Defendant's pro se motion was filed together with a Declaration in Support of Request to Proceed In Forma Pauperis, a Declaration of Edwin Francisco Vasquez-Alvarez, and a Memorandum of Points and Authorities in Support of Writ of Habeas Corpus Pursuant to Title 28 U.S.C. § 2255.

to Defendant's Motion Pursuant to 28 U.S.C. § 2255 was filed on August 30, 2011.

For the following reasons, I dismiss defendant's petition for a writ of habeas corpus without a hearing, and I deny a certificate of appealability.

PROCEDURAL HISTORY[3]

On December 7, 2009, defendant entered an open guilty plea to Reentry after deportation in violation of 8 U.S.C. §§ 1326(a) and (b)(2). Defendant had been ordered deported from the United States to the Dominican Republic on November 10, 2005, following his conviction in the State of New York for Criminal sale of a controlled substance in the fifth degree, in violation of N.Y. Penal Law § 220.31.

Defendant was identified as having illegally entered the United States following his arrest on April 15, 2009 in Bethlehem, Northampton County, Pennsylvania, on an unrelated drug felony. On September 18, 2009 defendant pled guilty to Criminal conspiracy (to commit possession with intent to distribute a controlled substance), in violation of 18 Pa.C.S.A. § 903(a)(1).

[3] The procedural history is based upon the testimony and presentations at the change of plea hearing held on December 7, 2009 and the sentencing held on April 6, 2010; the transcript of sentencing filed July 22, 2011; defendant's motion to vacate sentence and memorandum in support, the government's response, and defendant's reply; and the record papers including the Indictment, the guilty plea agreement, the government's change of plea memorandum, the government's sentencing memorandum, the defendant's sentencing memorandum, the judgment of sentence; and the Presentence Investigation Report prepared by Senior United States Probation Officer Alexander T. Posey on March 2, 2010, and revised on March 24, 2010 and March 30, 2010.

On the same day, the Court of Common Pleas of Northampton County, Pennsylvania imposed a sentence of imprisonment of not less than 9 months nor more than 23 months.

In addition, the United States Immigration and Customs Enforcement Bureau of the United States Department of Homeland Security, filed a detainer against defendant on May 29, 2009, while he was in state custody.

Under the United States Sentencing Guidelines, defendant's base offense level is 8, which was adjusted upward by 12 levels to an offense level of 20 because of defendant's prior felony drug conviction in the State of New York, pursuant to U.S.S.G. § 2L1.2(b)(1)(B). Defendant's offense level was ultimately reduced by two levels for acceptance of responsibility[4], and by an additional offense level for timely notifying the government of his intention to plead guilty[5]. Accordingly, defendant's total offense level was 17, and his criminal history category was III, which yielded a guideline sentence range of 30 to 37 months imprisonment.

On April 6, 2010, I sentenced defendant to 27 months imprisonment, a term of supervised release of 3 years, and a special assessment of $100.00. At the sentence hearing,

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[4] See U.S.S.G. § 3E1.1(a).

[5] See U.S.S.G. § 3E1.1(b).

defendant waived his appellate rights,[6] and, accordingly, defendant did not file a direct appeal.

As described above, on January 14, 2011 defendant filed the within motion to vacate, set aside, or correct sentence in the nature of a petition for writ of habeas corpus. The government responded on July 13, 2011, and petitioner filed a reply brief in opposition on August 30, 2011.

CONTENTIONS OF THE PARTIES

Defendant's Contentions

Defendant contends that he was denied his right to effective assistance of counsel under the Sixth Amendment to the United States Constitution because his court-appointed trial counsel, Robert E. Sletvold, Esquire, failed to make three arguments at his sentence hearing and failed to file a direct appeal.

Defendant recognizes that he waived his direct and collateral appeal rights. However, he contends that the waiver is unenforceable because Attorney Sletvold was ineffective. Defendant contends that Attorney Sletvold advised defendant to waive these rights under the erroneous premise that such waiver was required for defendant to receive a two-year sentence, with one-year credit for his time served in state custody. Thus,

[6] As described in greater detail below, defendant waived his appellate rights in order for the court to consider granting him a four-level downward departure pursuant to U.S.S.G. § 5K3.1.

defendant contends that this court can consider the merits of his claims.

Defendant asserts that counsel was deficient for failing to argue at his sentencing that: (1) he was entitled to a downward departure based upon both the length of time he lived in the United States and his motives for re-entering the United States; (2) his initial deportation was invalid, and the corresponding offense level was incorrectly calculated pursuant to section 2L1.2 of the United States Sentencing Guidelines; and (3) he was entitled to up to one-year of credit toward his federal sentence for his time spent in state custody, during which time he was also subject to an immigration detainer, pursuant to U.S.S.G. §§ 5G1.3(b) and (c) and 5K2.23.

Further, defendant contends that counsel was ineffective because defendant informed him that he wanted to appeal these grounds, but counsel failed to file a direct appeal.

Contentions of the Government

The government contends that the petition should be dismissed because defendant waived his right to appeal and to collaterally attack his conviction, and the waiver had no exceptions. Further, the government contends that the waiver was knowing and voluntary, and that enforcing the waiver in this case would not constitute a miscarriage of justice.

In the alternative, the government additionally contends that the petition should be dismissed on the merits because counsel's performance was not deficient. First, the government contends that counsel was not ineffective because, contrary to defendant's contentions, counsel properly argued for a downward departure based upon defendant's alleged reasons for re-entering the United States and the length of time defendant had lived in the United States.

Next, the government argues that defendant was properly deported based upon his prior "drug trafficking crime" pursuant to 8 U.S.C. § 1101(a)(43)(B), which also properly increased his base offense level by twelve levels pursuant to U.S.S.G. § 2L1.2(b)(1)(B).

In addition, the government avers that counsel was not deficient because defendant was not entitled to credit for time served in detention because such relief is only available pursuant to 18 U.S.C. § 3585(b) and must be calculated by the Bureau of Prisons after sentencing. Further, the government contends that defendant was not entitled to have his state sentence run concurrently with his federal sentence because Application Note 2(B) to U.S.S.G. § 5G1.3(b) does not permit a sentence to run concurrently where the prior offense is an aggravated felony for which defendant received an increase under U.S.S.G. § 2L1.2.

Finally, the government asserts that counsel was not deficient for failing to file a direct appeal because defendant waived his right to file a direct appeal.

STANDARD OF REVIEW

Section 2255 of Title 28 of the United States Code provides federal prisoners with a vehicle for challenging an unlawfully imposed sentence. Section 2255 provides, in relevant part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such a sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2255(a).

A motion to vacate sentence under section 2255 "is addressed to the sound discretion of the district court". United States v. Williams, 615 F.2d 585, 591 (3d Cir. 1980). A petitioner may prevail on a section 2255 habeas claim only by demonstrating that an error of law was constitutional, jurisdictional, "a fundamental defect which inherently results in a complete miscarriage of justice," or an "omission inconsistent with the rudimentary demands of fair procedure." Hill v. United

States, 368 U.S. 424, 428, 82 S.Ct. 468, 471, 7 L.Ed.2d 417, 421 (1962).

DISCUSSION

Waiver of Appellate Rights

At defendant's sentencing hearing, he waived his appellate and collateral attack rights as a prerequisite to having this court consider a four-level downward departure pursuant to U.S.S.G. § 5K3.1. Section 5K3.1 authorizes such departures when they are part of an early disposition program, or a fast-track program. Fast-track programs allow qualifying immigrant defendants to plead guilty while waiving, among other things, their appellate rights in exchange for the government's request for a downward departure.

This judicial district has not instituted a fast-track program. However, the United States Court of Appeals for the Third Circuit has authorized judges in non-fast-track districts to consider comparable departures when reviewing 18 U.S.C. § 3553(a) sentencing factors. United States v. Arrelucea-Zamudio, 581 F.3d 142, 148-149 (3d Cir. 2009).

In reliance on Arrelucea-Zamudio, defendant waived his appellate rights at sentencing consistent with the requirements for districts that have instituted fast-track programs.[7]

[7] See Notes of Testimony of the hearing conducted before me on April 6, 2010 in Allentown, Pennsylvania, styled "Transcript of Sentencing Hearing Before the Honorable James Knoll Gardner[,] United States District Judge" ("N.T."), pages 9-13.

However, defendant acknowledged that this judicial district does not have a fast-track program and that the court was not required to grant him a downward departure despite the waiver.[8]

Waivers of direct appeal rights will be enforced when they are entered into knowingly and voluntarily and their enforcement does not work a miscarriage of justice. See United States v. Khattak, 273 F.3d 557, 562 (3d Cir. 2001). Waivers of collateral appeal rights will be enforced under the same conditions. See United States v. Mabry, 536 F.3d 231, 237 (3d Cir. 2008).

Defendant contends that he was "duped into waiving his right to a Direct Appeal" by Attorney Sletvold because defendant was led to believe that such waiver was necessary for him to secure a "special deal" whereby he would be sentenced to two-years imprisonment, and he would receive credit for the one-year he spent in state custody.[9]

The hearing before me on April 6, 2010 reveals that defendant's waiver of his direct and collateral appellate rights was, in fact, knowing and voluntary, and that defendant fully understood the implications of waiving these rights.[10] Defendant does not contend that his waiver was involuntary or

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[8] N.T., pages 24 and 25.

[9] Memorandum of Points and Authorities in Support of Writ of Habeas Corpus Pursuant to Title 28 U.S.C. § 2255, filed January 14, 2011, page 4.

[10] N.T., pages 9-13.

uninformed, and nothing in the transcript supports defendant's bald assertion that he was "duped" into waiving his appellate rights or that he was promised a "special deal" in exchange for the waiver.[11]

In addition, defendant explicitly stated on the record that no promises had been made to him to get him to waive his appellate rights.[12] Thus, "[d]efendant's unsupported *ex post* statements that the waiver was not knowing and intelligent, without more, fail to meet the burden required to rebut the presumption of truthfulness that attaches to the statements that he made, under oath" at the sentencing hearing. United States v. Ballard, 2009 WL 637384, at *6 (E.D.Pa. Mar. 11, 2009)(DuBois, S.J.).

In addition, defendant has alleged no error amounting to a miscarriage of justice which would invalidate his appellate waiver.

Courts in this Circuit have held that enforcement of a waiver that is itself based upon ineffective assistance of counsel may result in a miscarriage of justice. United States v. Akbar, 181 Fed.Appx. 283, 286 (3d Cir. 2006); see also United States v. Robinson, 2004 WL 1169112, at *3 (E.D.Pa. April 30, 2004)(Baylson, J.)(collecting cases). An ineffective assistance

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[11] See N.T., pages 9-13.

[12] N.T., page 12.

of counsel argument "survives only with respect to those discrete claims which related directly to the negotiation of the waiver." Ballard, 2009 WL 637384, at *4 (internal quotations omitted).

A claim of ineffective assistance of counsel requires a defendant to show that counsel's performance was constitutionally deficient and that counsel's errors prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984). There is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy". Strickland, 466 U.S. at 689, 104 S.Ct. at 2065, 80 L.Ed.2d at 694-695 (internal quotation omitted).

Defendant claims that he would not have waived his appellate rights had Attorney Sletvold not promised him a lenient sentence, which promise constitutes ineffective assistance of counsel.[13]

A waiver does not become ineffective merely because a defendant claims ineffective assistance of counsel, but "only if the record of the criminal proceeding revealed that the claim that the waiver was the result of ineffective assistance of counsel was meritorious." Akbar, 181 Fed.Appx. at 286-287

[13] Petition, Exhibit B, ¶ 35.

(internal quotations omitted).

The record does not indicate that defendant could succeed on an ineffective assistance claim. As described above, defendant was explicitly asked at the sentencing hearing whether any promises were made to him in order to convince him to waive his appellate rights, and defendant responded in the negative.[14] Accordingly, the record does not support defendant's contention that he only agreed to waive his rights based upon counsel's erroneous promise of a two-year sentence with credit for his one-year in state custody.

Because defendant has not shown that enforcement of the waiver would cause a miscarriage of justice, I conclude that the appellate waiver is enforceable.

The government contends that defendant's petition should be dismissed because the waiver does not provide any exceptions.

However, as this court noted at the sentencing hearing, the fast-track programs described by the Third Circuit in Arrelucea-Zamudio require a defendant to waive his right to file a section 2255 habeas petition with the exception of claims for ineffective assistance of counsel.[15] 581 F.3d at 146 and 157. This court additionally noted that defendant's waiver was

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[14] N.T., page 12.

[15] N.T., pages 46-47.

consistent with the waiver required by defendants entering fast-track programs.[16] Accordingly, it appears that defendant's appellate waiver provided an exception for bringing habeas claims based upon ineffective assistance of counsel.

All four of the grounds raised in defendant's petition are claims of ineffective assistance of counsel. Accordingly, although I conclude that defendant's waiver is otherwise enforceable, in an abundance of caution I proceed to address the merits of defendant's claims.

Ineffective Assistance of Counsel

In the first ground for habeas relief, defendant contends that Attorney Sletvold was ineffective for failing to argue for a cultural assimilation downward departure from his otherwise applicable guideline range based upon the extraordinary circumstances under which he tried to re-enter the United States. Defendant contends that he had lived in the United States almost all of his life, and that he sought re-entry to help his invalid father and to care for his eleven children. Defendant further avers that he was escaping abusive treatment by the police in the Dominican Republic.

The government contends that defendant's assertions are contrary to the facts of the case because Attorney Sletvold did argue for a downward departure pursuant to these circumstances in

[16] N.T., pages 48-49.

both his sentencing memorandum and at the sentencing hearing.

I conclude that the government is correct because defendant's sentencing memorandum contains these arguments, and defendant made similar arguments for downward departure at the sentencing hearing.[17] Accordingly, defendant has not established that Attorney Sletvold's performance was deficient, and his ineffective assistance of counsel claim must fail.

Defendant's second ground for habeas relief asserts that Attorney Sletvold was ineffective for failing to challenge his underlying deportation. Defendant further contends that counsel was ineffective for failing to challenge his offense level because his deportation was for a misdemeanor and not for an aggravated felony under the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(B), which resulted in his offense level being incorrectly calculated pursuant to section 2L1.2 of the United States Sentencing Guidelines.

The government contends that counsel was not ineffective because, contrary to defendant's contentions, the offense for which he was deported was a felony drug offense under the Immigration and Nationality Act. In addition, the government avers that defendant's base offense level was appropriately raised by twelve levels because his felony drug offense in the State of New York is a qualifying conviction under U.S.S.G.

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[17] N.T., pages 26-27; Defendant's Sentencing Memorandum, filed April 5, 2010, Document 17, pages 1, 2, and 4.

§ 2L1.2(b)(1)(B).

I conclude that counsel was not ineffective because the sentencing arguments defendant raises are not meritorious, and counsel cannot be deficient for failing to make a meritless argument. See United States v. Sanders, 165 F.3d 248, 253 (3d Cir. 1999).

Defendant's deportation was for an "aggravated felony", and not for a misdemeanor, under the Immigration and Nationality Act. 8 U.S.C. § 1101(a)(43)(B). The Immigration and Nationality Act defines "aggravated felony", in relevant part, as "illicit trafficking in a controlled substance (as defined in section 102 of the Controlled Substances Act [21 U.S.C. § 802], including a drug trafficking crime (as defined in section 924(c) of title 18, United States Code)". 8 U.S.C. § 1101(a)(43)(B). Section 924(c) defines a "drug trafficking crime" as "any felony punishable under the Controlled Substances Act". 18 U.S.C. § 924(c)(2).

Defendant's New York state conviction for Criminal sale of a controlled substance in the fifth degree is conduct punishable as a felony under the Controlled Substances Act. See 21 U.S.C. § 841(a)(1). First, the Controlled Substances Act defines "felony" as "any Federal or State offense classified by applicable Federal or State law as a felony." 21 U.S.C. § 802(13). Section 220.31 of the New York Penal Law defines defendant's crime as a felony under state law.

Further, the Controlled Substances Act provides that it is "unlawful for any person knowingly or intentionally to...distribute...a controlled substance". 21 U.S.C. 841(a). Defendant's criminal sale of a controlled substance is conduct that is punishable under section 841(a). See 21 U.S.C. §§ 802(8) and (11) and 841(a)(1).

Accordingly, defendant was properly deported for an "aggravated felony" under the Immigration and Nationality Act, and counsel was not deficient for failing to challenge defendant's deportation.

Likewise, defendant's base offense level was properly increased by twelve levels to reflect that he had a prior conviction "for a felony drug trafficking offense for which the sentence imposed was 13 months [imprisonment] or less." U.S.S.G. § 2L1.2(b)(1)(B); see United States v. Lopez, 650 F.3d 952, 958 & n.6 (3d Cir. 2011). Defendant was sentenced to five-years probation for his violation of section 220.31 of the New York Penal Law. Therefore, defendant was subject to the twelve-level increase to his base offense level, and counsel was also not deficient for failing to challenge the increase.

Accordingly, I dismiss defendant's second ineffective assistance of counsel claim.

In defendant's third ground for habeas relief, he

contends that Attorney Sletvold was ineffective for failing to argue at sentencing that the court had the authority to credit his federal sentence with the one-year he spent in state custody, pursuant to U.S.S.G. §§ 5G1.3(b) and (c) and 5K2.23.

The government avers that the sections 5G1.3(b) and (c) of the Sentencing Guidelines are inapplicable pursuant to Application Notes 2(B) and 3(E), and thus do not authorize this court to allow defendant's state sentence to run concurrently with his federal sentence or to credit his federal sentence for the time he spent in state custody. Further, the government contends that to the extent defendant argues that he should have been granted credit for time served on an immigration detainer, this court lacks the authority grant such relief because this adjustment may only be calculated after sentencing by the Bureau of Prisons. See 18 U.S.C. § 3585(b).

I conclude that Attorney Sletvold's performance was not deficient because the sentencing arguments put forth by defendant are not meritorious, and counsel cannot be ineffective for failing to make frivolous arguments. See Sanders, 165 F.3d at 253.

Defendant was still serving his state sentence for his 2009 conviction for a felony drug crime at the time of his federal sentencing for his conviction for Reentry after deportation.

Section 5G1.3 of the Sentencing Guidelines addresses imposing a sentence on a defendant subject to an undischarged term of imprisonment. Section 5G1.3(b) requires a court to adjust a defendant's sentence for any period already served on the undischarged term of imprisonment, and to impose a sentence that runs concurrently to the remainder of the undischarged term of imprisonment, in limited circumstances. U.S.S.G. § 5G1.3(b).

However, section 5G1.3(b) only applies where the undischarged "term of imprisonment resulted from another offense...that was the basis for an increase in the offense level for the instant offense". U.S.S.G. § 5G1.3(b). In this case, defendant's offense for which an undischarged term of imprisonment remained did not serve as the basis for an increase in defendant's offense level.

The Presentence Investigation Report explains that defendant's offense level was subject to a twelve-level increase because of his New York felony drug conviction, and not because of his most recent 2009 Pennsylvania felony drug conviction for which he was currently serving a state sentence.[18] Accordingly, section 5G1.3(b) is not applicable to defendant's case on its face, and I do not need to consider the government's additional arguments pursuant to Application Note 2(B) to U.S.S.G.

[18] Presentence Investigation Report, ¶ 19.

§ 5G1.3(b).

Similarly, I conclude that section 5K2.23 does not apply because this section requires both that: (1) defendant have completed serving his term of imprisonment for the prior offense and (2) section 5G1.3(b) would otherwise be applicable if the term of imprisonment had been undischarged at the time of sentencing for the instant offense. Because defendant's case satisfies neither requirement, section 5K2.23 is inapposite.

Section 5G1.3(c) also does not apply to defendant's case. Section 5G1.3(c) provides as follows:

> (c) (Policy Statement) In any other case involving an undischarged term of imprisonment, the sentence for the instant offense may be imposed to run concurrently, partially concurrently, or consecutively to the prior undischarged term of imprisonment to achieve a reasonable punishment for the instant offense.

U.S.S.G. § 5G1.3(c).

I conclude that defendant's contention that this subsection allows this court to credit his federal sentence with the one-year he spent in state custody is incorrect. Application Note 3(E) to section 5G1.3 explicitly states that "subsection (c) does not authorize an adjustment of the sentence for the instant offense for a period of imprisonment already served on the undischarged term of imprisonment." U.S.S.G. § 5G1.3, Application Note 3(E); see also Escribano v. Schultz, 330 Fed.Appx. 21, 23 n.6 (3d Cir. 2009). Thus, Application

Note 3(E) precludes defendant's argument for credit toward his federal sentence.

Application Note 3(E) provides a limited exception for "an extraordinary case involving an undischarged term of imprisonment under subsection (c)". Such extraordinary case may occur "in a case in which the defendant has served a very substantial period of imprisonment on an undischarged term of imprisonment that resulted from conduct only partially within the relevant conduct for the instant offense." U.S.S.G. § 5G1.3, Application Note 3(E).

Defendant does not argue that his case is an extraordinary case, nor do the facts support such argument. Defendant did not serve "a very substantial period of imprisonment" on his 2009 drug felony, which amounted to one-year at the time of sentencing. Nor is it apparent that defendant's sentence would otherwise be "increased unduly by the fortuity and timing of separate prosecutions and sentencings" if he did not receive credit toward his federal sentence for the time he spent in state custody. U.S.S.G. § 5G1.3, Application Note 3(E).

Accordingly, I conclude that defendant was not entitled to credit toward his federal sentence for time served on his state sentence because section 5G1.3(c) is not applicable to his case.

Finally, I conclude that counsel was additionally not deficient for failing to request at sentencing that defendant be granted credit for time served on an immigration detainer.

A defendant may be granted credit for the time served in detention for the same offense for which the defendant is ultimately sentenced pursuant to 18 U.S.C. § 3585(b). Even assuming section 3585 applied to defendant's case, the Attorney General, through the Bureau of Prisons - and not the sentencing court - has the authority to calculate this credit after defendant is sentenced. United States v. Wilson, 503 U.S. 329, 332-335, 112 S.Ct. 1351, 1353-1355, 117 L.Ed.2d 593, 599-601 (1992); see also Escribano, 330 Fed.Appx. at 23. Accordingly, defendant has not established that Attorney Sletvold was ineffective for failing to make any of the above arguments at sentencing, and I dismiss defendant's third ground for habeas relief.

Defendant's final ground for habeas relief also fails because defendant cannot establish that Attorney Sletvold was ineffective. Defendant contends that counsel was ineffective for failing to file a direct appeal because defendant indicated his desire to appeal on the basis of his alleged invalid deportation and the credits toward his federal sentence to which he believed he was entitled.

As previously discussed, defendant's appellate wavier is valid and enforceable. Thus, because he did not have any non-frivolous grounds for appeal, counsel cannot be ineffective for failing to file a direct appeal where this right has been properly waived. See Roe v. Flores-Ortega, 528 U.S. 470, 480, 120 S.Ct. 1029, 1036, 145 L.Ed.2d 985, 996 (2000).

Accordingly, because all four of defendant's grounds alleging ineffective assistance of counsel are without merit, I dismiss defendant's petition for a writ of habeas corpus.

I further dismiss the petition without holding an evidentiary hearing. "[T]o merit a hearing, a claim for ineffective assistance of counsel, accepting the veracity of [defendant's] allegations, must satisfy both prongs of the *Strickland* test, deficient counsel and prejudice to the defense." Wells v. Petsock, 941 F.2d 253, 260 (3d Cir. 1991). A district court "must order an evidentiary hearing to determine the facts unless the motion and files and records of the case show conclusively that [defendant] is not entitled to relief." Virgin Islands v. Forte, 865 F.2d 59, 62 (3d Cir. 1989). The question of whether to order a hearing is committed to the sound discretion of the district court. Id.

Accepting the veracity of defendant's allegations, as discussed above, I conclude that defendant cannot establish deficient performance on any of the four grounds identified in

his habeas petition. Accordingly, I conclude that he fails on all four grounds to satisfy Strickland, and therefore an evidentiary hearing is not required.

Certificate of Appealability

The Third Circuit Local Appellate Rules require that "[a]t the time a final order denying a petition under 28 U.S.C. § 2244 or § 2255 is issued, the district judge will make a determination as to whether a certificate of appealability should issue." 3d Cir. L.A.R. 22.2 (2011). A certificate of appealability shall issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

Here, jurists of reason would not debate the conclusion that defendant's petition fails to state a valid claim of the denial of a constitutional right. See Slack v. McDaniel, 529 U.S. 473, 484, 120 S.Ct. 1595, 1603, 146 L.Ed.2d 542, 554 (2000). Accordingly, a certificate of appealability is denied.

CONCLUSION

For all the foregoing reasons, I dismiss defendant's motion in the nature of a petition for a writ of habeas corpus. Moreover, a certificate of appealability is denied.